



Robert Alexy

## Constitutional Rights and Proportionality

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# Constitutional Rights and Proportionality

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## 1 Necessary and Contingent Connections

- 1 The relationship between constitutional rights and proportionality is one of the main themes of the contemporary constitutional debate. Two basic views are in conflict: the thesis that there exists some kind of a necessary connection between constitutional rights and proportionality analysis, and the thesis that there exists no necessary connection of whatever kind between constitutional rights and proportionality. According to the second view, the question of whether constitutional rights and proportionality are connected depends on positive law, that is, on what the framers of the constitution have actually decided. For that reason, a connection between constitutional rights and proportionality can only be a possible or contingent connection.<sup>1</sup> The first thesis may be termed the ‘necessity thesis’, the second, the ‘contingency thesis’. I will defend a version of the necessity thesis.

## 2 Principles Theory and Proportionality: The First Necessity Thesis

### 2.1 Rules and Principles

- 2 The necessity thesis has found its most elaborated form in principles theory. The basis of principles theory is the norm-theoretic distinction between rules and principles.<sup>2</sup> Rules are norms that require something definitively. They are *definitive commands*. Their form of application is subsumption. If a rule is valid and if its conditions of application are fulfilled, it is definitively required that exactly what it demands be done. If this is done, the rule is complied with; if this is not done, the rule is not complied with. By contrast, principles are *optimization requirements*. As such, they demand that something be realized ‘to the greatest extent possible given the legal and factual possibilities’.<sup>3</sup> Rules aside, the legal possibilities are determined essentially by opposing principles. For this reason, principles, each taken alone, always comprise a merely *prima facie* requirement. The determination of the appropriate degree of satisfaction of one principle relative to the requirements of other principles is brought about by balancing. Thus, balancing is the specific form of application of principles.

### 2.2 The Principle of Proportionality

#### a) Optimization Relative to Factual and Legal Possibilities

- 3 The definition of principles as optimization requirements leads straightaway to a necessary connection between principles and proportionality. The principle of proportionality (*Verhältnismäßigkeitsgrundsatz*), which in the last decades has received ever more international recognition in the theory and practice of constitutional review,<sup>4</sup> consists of three sub-principles: the principles of suitability, of necessity, and of proportionality in the narrower sense. All three sub-principles express the idea of optimization. Principles *qua* optimization requirements require optimization relative both to what is factually possible and to what is legally possible. The principles of suitability and necessity refer to optimization relative to the factual possibilities. The principle of proportionality in the narrower sense concerns optimization relative to the legal possibilities.

#### b) Suitability

- 4 The first sub-principle, the principle of suitability, precludes the adoption of means that obstruct the realization of at least one principle without promoting any principle or goal for which it has been adopted. If a means *M*, adopted in order to promote the principle *P*<sub>1</sub>, is not suitable for this purpose, but obstructs the realization of *P*<sub>2</sub>, then there are no costs either to *P*<sub>1</sub>

or  $P_2$  if  $M$  is omitted, but there are costs to  $P_2$ , if  $M$  is adopted. Thus,  $P_1$  and  $P_2$  taken together may be realized to a higher degree relative to what is factually possible if  $M$  is abandoned.  $P_1$  and  $P_2$ , when *taken together*, that is, as elements of a single system, proscribe the use of  $M$ . This shows that the principle of suitability is nothing other than an expression of the idea of Pareto-optimality. One position can be improved without detriment to the other.

5 An example of the violation of the principle of suitability is found in a decision of the German Federal Constitutional Court concerning a law which required that not only persons who apply for a general hunting licence have to pass a shooting examination but also persons who apply exclusively for a falconry licence. The Court argued that the shooting examination for falconers is not suitable in promoting the ‘proper exercise of these activities as intended by the legislator’.<sup>5</sup> Therefore, ‘no substantially clear reason’<sup>6</sup> existed for the infringement of the general freedom of action of the falconer, as guaranteed by article 2 (1) Basic Law. For that reason, the regulation was declared unproportional<sup>7</sup> and, consequently, unconstitutional.

### c) Necessity

6 Cases in which laws are declared unconstitutional for reasons of unsuitability are rare. Normally the measure applied by the legislator will at least promote his aims to a certain degree. This suffices for suitability. For this reason, the practical relevance of the sub-principle of suitability is rather low. This is completely different with respect to the second sub-principle of the principle of proportionality, the principle of necessity. This principle requires that of two means promoting  $P_1$  that are, broadly speaking, equally suitable, the one that interferes less intensively with  $P_2$  has to be chosen. If there exists a less intensively interfering and equally suitable means, one position can be improved at no costs to the other.<sup>8</sup> Under this condition,  $P_1$  and  $P_2$ , *taken together*, require the less intensively interfering means be applied. This is, again, a case of Pareto-optimality.

7 An example is the decision of the Federal Constitutional Court on sweets, especially in form of Easter rabbits and Santa Clauses that consist of puffed rice. In order to protect consumers from mistakenly taking those puffed rice sweets to be chocolate products, a ban on puffed rice sweets was issued. The Court argued that consumer protection could be achieved ‘in an equally effective but less incisive way by a duty of marking’.<sup>9</sup> For this reason, the ban was declared to be a violation of the principle of necessity and, therefore, as unproportional.

### d) Proportionality in the Narrower Sense

8 Just as with the principle of suitability, the principle of necessity concerns optimization relative to the factual possibilities. Optimization relative to the factual possibilities consists in avoiding avoidable costs. Costs, however, are unavoidable when principles collide. Then balancing becomes necessary. Balancing is the subject of the third sub-principle of the principle of proportionality, the principle of proportionality in the narrower sense. This principle expresses what optimization relative to the legal possibilities means. It is identical with a rule that can be called ‘Law of Balancing’.<sup>10</sup> This rule states:

The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other.

9 The Law of Balancing excludes, *inter alia*, an intensive interference with principle  $P_1$  that is justified only by a low importance assigned to the satisfaction of the colliding principle  $P_2$ . Such a solution would not be an optimization of  $P_1$  *together with*  $P_2$ .

10 The Law of Balancing is to be found, in different formulations, nearly everywhere in constitutional adjudication. It expresses a central feature of balancing and is of great practical importance. If one wishes to achieve a precise and complete analysis of the structure of balancing, the Law of Balancing has, however, to be elaborated further. The result of such a further elaboration is the Weight Formula.<sup>11</sup> The Weight Formula defines the weight of a principle  $P_i$  in a concrete case, that is, the concrete weight of  $P_i$  relative to a colliding principle  $P_j$  ( $W_{i,j}$ ), as the quotient of, first, the product of the intensity of the interference with  $P_i$  ( $I_i$ ) and the abstract weight of  $P_i$  ( $W_i$ ) and the degree of reliability of the empirical assumptions concerning what the measure in question means for the non-realization of  $P_i$  ( $R_i$ ), and, second,

the product of the corresponding values with respect to  $P_j$ , now related to the realization of  $P_j$ . It runs as follows:

$$W_{i,j} = \frac{I_i \cdot W_i \cdot R_i}{I_j \cdot W_j \cdot R_j}$$

- 11 Now, to talk about quotients and products is sensible only in the presence of numbers. This is the problem of graduation. In *A Theory of Constitutional Rights* I considered only a continuous scale that runs over an infinite number of points between 0 and 1, and I arrived at the conclusion that it is impossible to work with such a scale in legal reasoning.<sup>12</sup> I still believe that this result is correct. Things are different, however, as soon as one takes into account not only continuous or infinitesimal scales but also discrete scales. Discrete scales are defined by the fact that between their points no further points exist. Balancing can begin as soon as one has a scale with two values, say, light and serious. In constitutional law a triadic scale is often used, which works with the values light (*l*), moderate (*m*), and serious (*s*). There are various possibilities in representing these values by numbers.<sup>13</sup> If one chooses a geometric sequence like  $2^0$ ,  $2^1$ , and  $2^2$ , it becomes possible to represent the fact that the power of principles increases overproportionally with increasing intensity of interference. This is the basis of an answer to the reproach that principles theory leads to an unacceptable weakening of constitutional rights. If the concrete weight ( $W_{i,j}$ ) of  $P_i$  is greater than 1,  $P_i$  precedes  $P_j$ , if it is smaller than 1,  $P_j$  precedes  $P_i$ . This connects the Weight Formula – and with it the Law of Balancing – with the Law of Competing Principles.<sup>14</sup> If, however, the concrete weight ( $W_{i,j}$ ) is 1, a stalemate exists. In this case, it is both permitted to perform the measure in question and to omit it. This means that the state, especially the legislator, has discretion.<sup>15</sup> This is of utmost importance for a reply to the reproach that principles theory leads to an overconstitutionalization.<sup>16</sup>
- 12 Against the Weight Formula the objection might be put forward that legal reasoning cannot be reduced to calculation. But this would rest on a misconception of the role of the Weight Formula. The numbers that have to be substituted for its variables represent propositions, for instance, the proposition ‘The interference with the freedom of expression is serious’. This proposition has to be justified, and this can only be done by argument. In this way, the Weight Formula is intrinsically connected with legal discourse. It expresses a basic argument form of legal discourse.<sup>17</sup>
- 13 Again, it might be useful to turn to a case in order to illustrate the abstract explanation of the principle of proportionality in the narrower sense. It is a decision of the Federal Constitutional Court that concerns the classic conflict between freedom of expression and personality right. A widely published satirical magazine, *Titanic*, described a paraplegic reserve officer who had successfully carried out his responsibilities, having been called to active duty, first as ‘born murderer’ and in a later edition as a ‘cripple’. The Düsseldorf Higher Regional Court of Appeal ruled against *Titanic* in an action brought by the officer and ordered the magazine to pay damages in the amount of DM 12.000. *Titanic* brought a constitutional complaint. The Federal Constitutional Court undertook ‘case-specific balancing’<sup>18</sup> between freedom of expression of those associated with the magazine ( $P_1$ : article 5 (1) (1), Basic Law) and the officer’s general personality right ( $P_2$ : article 2 (1) in connection with article 1 (1), Basic Law). To this end the intensity of interference with these rights was determined, and they were placed in relationship to each other. The judgment in damages was treated as representing a ‘lasting’<sup>19</sup> or *serious* (*s*)

interference ( $I_1$ ) with freedom of expression. This conclusion was justified, above all, by the argument that awarding damages could affect the future willingness of those producing the magazine to carry out their work in the way they have done heretofore. The description ‘born Murderer’ was then placed in the context of the satire published by the *Titanic*. Here several persons had been described as having a surname at birth in a ‘recognisably humorous’ way, from ‘puns to silliness’.<sup>20</sup> This context made it impossible to see in the description ‘unlawful, serious, illegal harm to personality right’.<sup>21</sup> The interference with the personality right was thus treated as having a *moderate* ( $m$ ), perhaps even a *light* or minor ( $l$ ) intensity ( $I_2$ ). These assessments of intensity completed the first part of the decision. In order to justify an award of damages, which is a serious ( $s$ ) interference with the constitutional right to freedom of expression ( $P_1$ ), the interference with the right to personality ( $P_2$ ), which was supposed to be compensated for by damages, would have had to have been at least as serious ( $s$ ). But according to the assessment of the Court, it was not. It was at best moderate ( $m$ ), perhaps even merely light ( $l$ ). This meant that the interference with the freedom of expression was, according to the Law of Balancing and, with it, the Weight Formula, disproportional and, therefore, unconstitutional.

14 Matters, however, were different in that part of the case where the officer had been called a ‘cripple’. According to the assessment of the Court, this counted as ‘serious harm to his personality right’.<sup>22</sup> This assessment was justified by the fact that describing a severely disabled person in the public as a ‘cripple’ is generally taken, these days, to be ‘humiliating’ and to express a ‘lack of respect’.<sup>23</sup> Thus, the serious ( $s$ ) interference ( $I_1$ ) with the freedom of expression ( $P_1$ ) was countered by the great ( $s$ ) importance ( $I_2$ ) accorded to the protection of personality ( $P_2$ ). This is a typical case of a stalemate. Consequently, the Court came to the conclusion that it could see ‘no flaw in the balancing to detriment of freedom of expression’<sup>24</sup> in the decision of the Düsseldorf Higher Regional Court of Appeal. *Titanic*’s constitutional complaint was thus only justified to the extent that it related to damages for the description ‘born Murderer’. As far as the description ‘cripple’ was concerned, it was unjustified.

### 2.3 Two Necessary Connections

15 My considerations up to this point have concerned the relationship between principles theory and proportionality. This connection turns out to be as close as it could possibly be. According to principles theory, principles are optimization requirements. Now the principle of proportionality with its three sub-principles of suitability, necessity, and proportionality in the narrower sense logically follows from the nature of principles as optimization requirements, and the nature of principles as optimization requirements logically follows from the principle of proportionality.<sup>25</sup> This equivalence is necessary.

16 At exactly this point, a decisive distinction comes into play. It is the distinction between a necessary connection between principles theory and proportionality on the one hand, and a necessary connection between principles theory including proportionality – its equivalent – and constitutional rights on the other. The thesis that there exists a necessary connection between principles theory and proportionality might be called the ‘first necessity thesis’. The thesis that there exists a necessary connection between constitutional rights and principles theory, or proportionality analysis, shall be termed the ‘second necessity thesis’. Martin Borowski has drawn a distinction between the principles theory as such, that is, the principles theory as a general norm-theoretic thesis, and the application of principles theory to constitutional rights, that is, the principles theory as an interpretation of constitutional rights.<sup>26</sup> The first necessity thesis is a norm-theoretic thesis, the second necessity thesis is, by contrast, an interpretative thesis.

### 2.4 Two Objections to the First Necessity Thesis

17 The first necessity thesis has been far less contested than the second thesis. This, however, is not to say that it has received no criticism. Two objections shall be considered here. The first has been raised by Kai Möller. Möller claims that the thesis to the effect that the nature of principles implies the principle of proportionality is ‘mistaken’.<sup>27</sup> His main argument is that

the clause ‘greatest extent possible’ in the definition of principles in *A Theory of Constitutional Rights*, 47, correctly understood, refers not to balancing but to correctness. It means “‘the correct’ extent”.<sup>28</sup> The correct extent, in turn, is said to depend on ‘moral argument’.<sup>29</sup> This objection confronts balancing with two concepts, the concept of correctness and the concept of morality. My reply is that these concepts both require balancing where an interference with constitutional rights is concerned. The correctness of an interference with a constitutional right depends on whether this interference is justified. In cases of unsuitability and lack of necessity, no reason exists that would require the interference. The interference, therefore, is not justified. This shows that the determination of the correct extent necessarily presupposes the sub-principles of suitability and necessity. With this, optimization relative to the factual possibilities is connected with correctness. The crucial question with respect to proportionality in the narrower sense is whether the determination of the correct extent of a right depends on the intensity of interference ( $I_i$ ) with this right ( $P_i$ ) and the intensity of interference ( $I_j$ ) with the colliding right or goal ( $P_j$ ) by non-interference with the first right, along with the other factors of the Weight Formula. I think it does. A serious ( $s$ ) interference justified only by a low ( $l$ ) importance assigned to this interference for the satisfaction of the colliding principle cannot be correct, all other things being equal. In short, correctness depends on balancing.

18 Möller’s second point is the necessity of moral argument. The determination of the intensity of interference with the paraplegic reserve officer’s personality right by calling him a ‘cripple’ is, as mentioned above, based on the assessment of this description as humiliating and as an expression of lack of respect. These are moral arguments. Without such moral arguments, the Weight Formula would not be applicable in the *Titanic* case. This suffices to show that moral arguments are indispensable for the application of the Weight Formula.<sup>30</sup> The Weight Formula is not an alternative to moral argument, but a structure of legal and moral argumentation.<sup>31</sup>

19 A second objection against the first necessity thesis, that is, the thesis of a necessary connection between optimization and proportionality has been raised by Ralf Poscher. Poscher claims that ‘the principle of proportionality need not to be understood as an optimization requirement’.<sup>32</sup> He argues that there are alternatives to optimization as the ‘prohibition of gross disproportionality’ and the ‘guarantee of a minimal position’.<sup>33</sup> The prohibition of disproportionality is the same as the requirement of proportionality, and the requirement of proportionality, in turn, is the same as the optimization requirement. Poscher’s prohibition of *gross* disproportionality, therefore, is nothing other than a connection of the third sub-principle of the principle of proportionality, understood as an optimization requirement, with discretion in cases of disproportionality which is not gross. This is not the place to take up the question of whether granting such a discretion can be justified, for example, by formal principles. The only point of interest in this connection is that such a construction would remain completely within the realm of principles theory. This is different in the case of a guarantee of a minimal position. A guarantee of a minimum, if not determined by balancing, would, indeed, not be the same as optimization. It would, however, not only be different from optimization but also different from proportionality. It would not be an alternative interpretation of proportionality. Rather, it would be an alternative incompatible with proportionality. One who recommends the substitution of a guarantee of a minimum for the principle of proportionality in the narrower sense is recommending the abolishment of this principle. The question of whether such a proposal is justifiable turns on the question of whether a judgment such as the following can be defended: ‘The infringement with the constitutional right is serious while the reasons for it are, from the point of view of the constitution, only of low importance, but the infringement is nevertheless constitutional, for a minimal position remains untouched.’ I think this judgment cannot be defended.

20 Up to this point, our deliberations have been concerned with the first necessity thesis, that is, with general norm-theoretic questions. A necessary connection of principles theory and proportionality at the norm-theoretic level does not, however, imply a necessary connection between proportionality or principles theory and constitutional rights at the level of the interpretation of constitutional rights *qua* positive law. The second necessity thesis stands therefore in need of its own justification.

## 3 Constitutional Rights and Proportionality: The Second Necessity Thesis

### 3.1 Contingency and Positivity

- 21 The question of whether there exists a necessary connection between constitutional rights and proportionality or principles theory, that is, the question of whether the second necessity thesis is true, is highly contested. The main objection is that principles theory cannot be seen, as Matthias Jestaedt puts it, as the ‘universal theory of fundamental rights’.<sup>34</sup> It is no more than ‘a subject-specific theory /.../ which analyses the process of competing principles as part of the structure of fundamental rights’.<sup>35</sup> As such it has no ‘potentially universal explanatory value’.<sup>36</sup> It is not the ‘single central, fundamentally all-embracing and determining theory of the analysis and application of fundamental rights’.<sup>37</sup> For that reason, as Peter Lerche claims, only some ‘islands of optimization requirements’ exist in the field of constitutional rights.<sup>38</sup> Thus, constitutional rights, to use Jan Henrik Klement’s words, are not ‘for reasons of their essence’ principles.<sup>39</sup> They are ‘not principles on account of their nature /.../, but only when and to the extent that they are given this nature and distinctive character by the positive legal decision of the constitutional legislature’.<sup>40</sup> The question of how constitutional rights and proportionality are related to each other, therefore, has to be submitted to a ‘positivity test’.<sup>41</sup>
- 22 The last point is of crucial importance for the understanding of the contingency thesis, the counterpart of the necessity thesis. The contingency thesis claims that the question of whether constitutional rights are connected with proportionality depends exclusively on decisions that are given expression in positive law, in the case of a constitution, on the decisions of its framers.<sup>42</sup> The contingency thesis might therefore also be called the ‘positivity thesis’. My argument against the contingency or positivity thesis consists of two parts. The first concerns the nature of constitutional rights, the second concerns the claim to correctness as being necessarily connected with constitutional rights as well as with law in general.

### 3.2 The Dual Nature of Constitutional Rights

- 23 Constitutional rights are indeed positive law, that is to say, positive law at the level of the constitution. This does not suffice, however, to explain their nature. Positivity is but one side of constitutional rights, namely, their real or factual side. Over and above this they possess also an ideal dimension. The reason for this is that constitutional rights are rights that have been recorded in a constitution with the intention of transforming human rights into positive law – the intention, in other words, of positivizing human rights.<sup>43</sup> This intention is often an intention actually or subjectively held by the constitutional framers. And, over and above this, it is a claim necessarily raised by those who set down a catalogue of constitutional rights. In this sense, it is an objective intention. Now human rights are, first, moral, second, universal, third, fundamental, and, fourth, abstract rights that, fifth, take priority over all other norms.<sup>44</sup> Here, only two of these five defining properties are of interest: their moral and their abstract character. Rights exist if they are valid. The validity of human rights *qua* moral rights depends on their justifiability and on that alone. I have attempted to show that human rights are justifiable on the basis of discourse theory. The Leitmotiv of this justification is that the practice of asserting, asking, and arguing presupposes freedom and equality.<sup>45</sup> None of this can be elaborated here. For present purposes, the only point of interest in this connection is that human rights *qua* moral rights belong to the ideal dimension of law.
- 24 The second defining property that is important here is the abstract character of human rights. They refer *simpliciter* to objects like freedom and equality, life and property, and free speech and protection of personality. As abstract rights, human rights inevitably collide with other human rights and with collective goods like protection of the environment and public safety. Human rights, therefore, stand in need of balancing.
- 25 It might be objected that this is no argument at all for a necessary connection between balancing or proportionality and constitutional rights. After their transformation into positive law, human rights are positive rights and are nothing but positive rights. This, however, would be a

misconception of the dual nature of constitutional rights. The ideal character of human rights does not vanish once they have been transformed into positive law. Rather, human rights remain connected with constitutional rights as reasons for or against the content that has been established by positivization and as reasons required by the open texture of constitutional rights. Thus, the ideal dimension of human rights lives on, notwithstanding their positivization.

26 In reply to this, the objection might be raised that the enduring presence of the ideal dimension destroys the positive character of constitutional rights. But this is not the case. The dual nature thesis requires that one take seriously both the ideal and the real dimension of law. It requires, over and above this, that *prima facie* be given priority to the positive or authoritative dimension.<sup>46</sup> When the constitutional framers have decided a question of balancing by establishing a rule, the interpreter of the constitution is bound to apply it.<sup>47</sup> An example of a constitutional rights rule in the German Constitution that is strictly binding is article 102 Basic Law, which says: ‘The death penalty is abolished’. Other examples of decisions of the constitutional framers with the character of a rule are the restriction of freedom of assembly to the right ‘to assemble peaceably and without weapons’, this in article 8 (1) Basic Law, and the details of the highly complex regulation of the adoption of technical means for the acoustic observation of accommodation in which the suspect is supposed to reside, found in article 13 (3)–(6) Basic Law. The priority of the provisions issued by the constitutional framers is, however, not totally beyond question in all cases.<sup>48</sup> An example is article 12 (1) (1) Basic Law, according to which the freedom to choose a profession is, in contrast to the freedom to exercise a profession, subject to no limitations. If one were to take this as a strictly binding rule, not open to any balancing whatever, persons who never have passed law examination would have a constitutional right to be admitted to the bar. The Federal Constitutional Court declared such a result as ‘legally implausible’<sup>49</sup> and it correctly applied proportionality analysis.<sup>50</sup>

27 These examples illustrate the sense in which one can speak of a necessary connection between constitutional rights and proportionality. Principles are connected with all constitutional-rights norms regardless of whether, as such, they have the character of rules or principles. If the constitutional framers have passed on a collision of principles by issuing a rule, than the formal principle of the authority of the constitution requires that this rule be observed. If, however, this rule is ambiguous, vague, or evaluatively open, the substantive principles standing behind it immediately come back into play. This is also the case where the rule is incompatible with constitutional principles that are at least in some instances regulated by this rule of greater weight than the formal principle of the authority of the constitution together with the substantive principles backing the rule. The existence of these constellations leads to a necessary connection between constitutional rights and proportionality, whose character is potential. The counterpart of the necessary potential connection is the actual connection between constitutional rights and principles. An actual connection exists in all those cases in which constitutional-rights norms, as set down in the constitution, have to be interpreted directly as principles. This combination of actual and potential connections,<sup>51</sup> which stems from the dual nature of constitutional rights, serves to justify the second necessity thesis.<sup>52</sup>

### 3.3 Constitutional Rights and the Claim to Correctness

28 The existence of a sufficient reason for a thesis does not exclude the existence of further sufficient reasons for this thesis. A second reason for the second necessity thesis is based on the claim to correctness, which is necessarily connected with constitutional rights as well as with law in general. The claim to correctness has been explicated and defended elsewhere.<sup>53</sup> Here a single point is of interest. The claim to correctness, necessarily connected with constitutional review, requires that the decision of the constitutional court be as rational as possible. Many authors have argued that balancing is irrational.<sup>54</sup> One may term this reproach the ‘irrationality objection’. It is not possible to reply to this objection here.<sup>55</sup> Some remarks directed to the objection may, however, be helpful. A main argument for the irrationality objection is that the Weight Formula does not say ‘how the concrete weights to be inserted into the formula are identified, measured and compared’.<sup>56</sup> Now it is true that the Weight Formula does not tell us what an interference with a constitutional right ( $I_i, I_j$ ) comes to, when the scale light ( $I$ ),

moderate (*m*), and serious (*s*) is used. It also does not tell us what the abstract weights ( $W_i$ ,  $W_j$ ) of the colliding principles are. Finally, it says nothing about the reliability ( $R_i$ ,  $R_j$ ) of the relevant empirical assumptions. None of this, however, has anything to do with irrationality. Precisely the opposite is the case. The values that have to be substituted for the variables of the Weight Formula represent, as already mentioned, propositions, for example, the proposition that the infringement with the personality right is serious. Such propositions can be justified, and, of course, they have to be justified.<sup>57</sup> This can only be done by argument. Thus, the Weight Formula turns out to be an argument form of rational legal discourse.<sup>58</sup> As such, it is indispensable in order to introduce 'order into legal thought'.<sup>59</sup> It makes clear which points are decisive and how these points are related to one another.<sup>60</sup> A structure of constitutional rights-discourse that lays claim to still greater rationality is not possible. This suffices to demonstrate that proportionality analysis is necessarily required not only by the nature of constitutional rights but also by the claim to correctness, necessarily raised in constitutional review.

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- BVerfGE 76, 1 from 12 May 1987.
- BVerfGE 86, 1 from 25 March 1992.
- BVerfGE 115, 320 from 4 April 2006.

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## Notes

1 It is easy to conceive of a third thesis, namely, that a connection between constitutional rights and proportionality is impossible. This thesis, however, shall not be considered here.

2 See Alexy (2002a: 47–49).

3 See Alexy (2002a: 47).

4 See, for instance, Beatty (2004); Stone Sweet & Mathews (2008).

5 Decisions of the Federal Constitutional Court (*Entscheidungen des Bundesverfassungsgerichts*; hereafter: BVerfGE) 55, 159 (166).

6 BVerfGE 55, 159 (167).

7 BVerfGE 55, 159 (166).

8 The principle of necessity presupposes that it is indifferent to all other principles or goals where the question of whether the less or the more intensively interfering means is chosen arises. If, however, there exists a third principle or goal,  $P_3$ , that is affected negatively by the adoption of the means interfering less intensively with  $P_2$ , than the case cannot be decided by considerations concerning Pareto-optimality. When costs are unavoidable, balancing becomes necessary.

9 BVerfGE 53, 135 (146).

10 Alexy (2002a: 102).

11 Alexy (2003: 433–448); Alexy (2007a: 9–27).

12 Alexy (2002a: 97–99).

13 On this issue, see Alexy (2007a: 20–23).

14 Alexy (2002a: 53–54).

15 Alexy (2002a: 408, 410–414).

16 On this issue, see Böckenförde (1991: 188–190).

17 In Alexy (1989: 221–230), I presented the Subsumption Formula as the single basic argument form of legal discourse. In Alexy (2003: 443–448), I added to it the Weight Formula as a second basic argument form. Finally, in Alexy (2010b: 17–18), I attempted to close the system by adding a third basic argument form: analogy between or comparison of cases. These three basic argument forms link up with the concepts of rule, principle, and case respectively.

18 BVerfGE 86, 1 (11).

19 BVerfGE 86, 1 (10).

20 BVerfGE 86, 1 (11).

21 BVerfGE 86, 1 (12).

22 BVerfGE 86, 1 (13).

23 BVerfGE 86, 1 (13).

24 BVerfGE 86, 1 (13).

25 Alexy (2002a: 66).

26 Borowski (2007: 68–70).

27 Möller (2007: 459).

28 Möller (2007: 459).

29 Möller (2007: 460).

30 Tsakyrakis reproaches proportionality analysis with its pretence of being ‘totally extraneous to any moral reasoning’; Tsakyrakis (2009: 474). This does not apply to the analysis presented here. Indeed, the opposite is true.

31 Möller further argues that there may exist cases in which balancing is excluded; Möller (2007: 460–461; 465–467). From the point of view of principles theory such cases can be reconstructed either as cases in which the abstract weight of a principle is zero, that is, as cases of excluded reasons, or as cases in which the abstract weight of a principle is infinite, which has the effect that it becomes a categorical or absolute constraint. On this issue, see Alexy (2007b: 340–344).

32 Poscher (2007: 74).

33 Poscher (2007: 74).

34 Jestaedt (2012: ms. 28).

35 Jestaedt (2012: ms. 10).

36 Jestaedt (2012: ms. 10).

37 Jestaedt (2012: ms. 10).

38 Lerche (1997: 207).

39 Klement (2008: 761).

40 Jestaedt (2012: ms. 13).

41 Jestaedt (2012: ms. 13).

42 An example of the positivization of proportionality is article 52 (1) (2) Charter of Fundamental Rights of the European Union.

43 On this issue, see Alexy (2006: 17).

44 Alexy (2006: 18).

45 On this issue, see Alexy (1996); Alexy (2006: 19–22).

46 Alexy (2010a: 173–174; 179).

47 Alexy (2002a: 83).

48 Alexy (2002a: 83–84).

49 BVerfGE 7, 377 (401).

50 BVerfGE 7, 377 (404–405).

51 On this issue, see the ‘model of rules and principles’ in Alexy (2002a: 80–86).

52 The dual nature argument might be conceived as reconstruction of the thesis of the German Federal Constitutional Court to the effect that the principle of proportionality emerges ‘basically already from the nature of constitutional rights themselves’ (*‘im Grunde bereits aus dem Wesen der Grundrechte selbst’*); BVerfGE 19, 342 (349); 65, 1 (44); 76, 1 (50–51).

53 Alexy (2002b: 35–39); Alexy (2010a: 168–172).

54 See, for example, Habermas (1996: 259); Schlink (2001: 460).

55 A recent reply is found in Alexy (2010c: 26–32).

56 Jestaedt (2012: ms. 18); see also Poscher (2007: 76); Somek (2006: 135–136).

57 Such a justification may be highly elaborated; see, for example, BVerfGE 115, 320 (347–357), where the justification of the assessment of the intensity of interference comprises ten pages.

58 Alexy (2010c: 32).

59 Barak (2006: 173).

60 Often the objection is raised that the elements represented by the variables of the Weight Formula are incommensurable. See, for example, Alder (2006: 717–718). The reply to this is that the commensurability of the assessments on both sides of the balance is recognized from a common point of view, namely the point of view of the constitution. From this point of view, ‘incommensurability’ is nothing other than disagreement; see Alexy (2007a: 18).

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## Author

### Robert Alexy

Professor at the Christian Albrechts University, Kiel, Germany.



**dr. dr. h. c. mult. Robert Alexy**

Christian-Albrechts-Universität zu Kiel

Juristisches Seminar

Olshausenstr. 40

24118 Kiel

E-mail: alexy@law.uni-kiel.de

**Prof.**

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## Abstracts

There are two basic views concerning the relationship between constitutional rights and proportionality analysis. The first maintains that there exists a necessary connection between constitutional rights and proportionality, the second argues that the question of whether constitutional rights and proportionality are connected depends on what the framers of the constitution have actually decided, that is, on positive law. The first thesis may be termed 'necessity thesis', the second 'contingency thesis'. According to the necessity thesis, the legitimacy of proportionality analysis is a question of the nature of constitutional rights, according to the contingency thesis, it is a question of interpretation. The article defends the necessity thesis. | A previous version of this article has been published in *Chinese Yearbook of Constitutional Law*, Vol. 2010, 221–235.

*Ustavne pravice in sorazmernost.* Med pravniki obstajata dva temeljna pogleda na odnos med ustavnimi pravicami in presojo sorazmernosti. Po prvem so ustavne pravice nujno zvezane s presojo sorazmernosti, medtem ko je po drugem vprašanje povezanosti ustavnih pravic in sorazmernosti odvisno od dejanske odločitve ustavodajalca, tj. od pozitivnega prava. Prvi pogled lahko poimenujemo tudi kot »trditev o nujni zvezanosti«, drugega pa kot »trditev o nenujni zvezanosti«. Skladno s trditvijo o nujni zvezanosti je legitimnost presoje sorazmernosti vprašanje narave ustavnih pravic, medtem ko je skladno s trditvijo o nenujni zvezanosti to vprašanje razlage. V tem prispevku avtor zagovarja trditev o nujni zvezanosti ustavnih pravic in sorazmernosti. | Starejša različica te razprave je objavljena v *Chinese Yearbook of Constitutional Law*, Vol. 2010, 221–235.

## Index terms

**Keywords** : principles theory, proportionality analysis, constitutional rights, necessary connection, human rights, dual nature

**Ključne besede (sl)** : teorija načel, presoja sorazmernosti, ustavne pravice, nujna zveza, človekove pravice, dvojna narava